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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PHILONG HUYNH, Defendant and Appellant.	D075588 (Super. Ct. No. SCD222832)

APPEAL from an order of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

In 2011, a jury found defendant Philong Huynh guilty of (among other things) first degree felony-murder (Pen. Code, § 189)[1] and found true the special circumstance allegations that he committed the murder during the commission of sodomy (§ 190.2, subd. (a)(17)(D)) and oral copulation (§ 190.2, subd. (a)(17)(F)). We affirmed the convictions in 2012, concluding sufficient evidence supported the finding that the victim died by criminal agency (as opposed to a preexisting medical condition), and that the jury was properly instructed regarding causation principles in the context of this "single-perpetrator felony-murder case." (*People v. Huynh* (2012) 212 Cal.App.4th 285, 309 (*Huynh*).)[2]

In January 2019, Huynh filed a petition for resentencing under newly enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.), which narrowed the circumstances under which an individual can be convicted of felony-murder (§ 189), and provides for resentencing of individuals whose convictions would not meet the new standard (§ 1170.95). The trial court, relying on our prior opinion, found Huynh ineligible for resentencing because his conviction satisfied the new felony-murder standard—that is, Huynh "was the actual killer" (§ 189, subd. (e)(1))—and summarily denied the petition without appointing counsel or holding a hearing.[3]

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1 Further undesignated statutory references are to the Penal Code.

2 We partially published our opinion. We grant the Attorney General's unopposed request to take judicial notice of the unpublished portions of that opinion.

3 After the trial court denied Huynh's resentencing petition, Huynh filed in our court a petition for writ of habeas corpus based largely on the assertions he made in his

Huynh contends the trial court violated the prima facie review procedure set forth in section 1170.95, subdivision (c) by summarily denying his petition without first appointing counsel or holding an evidentiary hearing. The Courts of Appeal that have thus far considered similar contentions have rejected Huynh's proffered reading of this subdivision, and the issue is pending in the California Supreme Court. (See *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, S260598 (*Lewis*);[4] *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, S260493 (*Verdugo*); *People v. Torres* (2020) 46 Cal.App.5th 1168 (*Torres*).)

Pending further guidance from our high court, we likewise reject Huynh's proffered reading of section 1170.95, subdivision (c), and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Huynh's Convictions

We base the following factual summary of Huynh's underlying convictions on our prior opinion. (*Huynh*, *supra*, 212 Cal.App.4th at pp. 291-300.)

Prosecution Evidence

In January 2008, 23-year-old Dane Williams went missing after an evening of drinking with friends and coworkers. A few days later, his body was found in an alley,

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resentencing petition, which he attached to the writ petition. We issued an order stating we would consider the writ petition at the same time as this appeal.

4 We may cite a published opinion for its persuasive value while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1).)

rolled up in a rug. Although he was by all accounts heterosexual, someone else's semen was on his shirt, and his underwear were missing.

An autopsy conducted by forensic pathologist Dr. Mena determined Williams's lungs were congested and weighed twice their normal weight. Although this condition was consistent with death by a cardiac event or asphyxiation, Dr. Mena found no evidence either had occurred. The autopsy also disclosed a 60 percent blockage of a main coronary artery, but Dr. Mena concluded this narrowing alone did not cause Williams's death. Finally, toxicology tests showed Williams had a blood alcohol level between 0.17 and 0.21 percent, and a therapeutic level (0.36mg/L) of diazepam, a benzodiazepine drug. Dr. Mena opined that although these levels were insufficient to have caused Williams's death, they played a role in it. Unable to determine the cause or manner of Williams's death, Dr. Mena classified both as "undetermined."

Williams's death remained unresolved for 18 months. Then, while investigating a possible drugging and sexual assault by Huynh of a young heterosexual male (Jeremiah R.), investigators obtained a DNA sample from Huynh that matched the profile of the semen found on Williams's shirt. Further investigation uncovered additional physical evidence connecting Huynh to Williams.

Investigators found evidence that Huynh liked to have sex with young heterosexual males, and would surreptitiously slip pills into their drinks and have sex with them after they passed out. Searches of Huynh's apartment and car yielded numerous prescriptions for benzodiazepines, and records indicated Huynh had attended a

college for osteopathic medicine where he took a course in pharmacology that instructed on the effects of benzodiazepines.

In light of this new evidence, Dr. Mena testified that if he had known that Huynh had given Williams benzodiazepines and sexually assaulted him, he would have changed the manner of death to homicide and the cause of death to "sudden death during or around the time of sexual assault while intoxicated." Similarly, an anesthesiologist/cardiovascular specialist testified that Williams's cause of death was an "external obstruction to breathing," which contributed to the excessive weight of Williams's lungs. The doctor opined the combination of alcohol and benzodiazepines contributed to Williams's death by hampering any effective opposition against the external obstruction to his breathing.

Defense Evidence

The chief medical examiner for San Diego County and a deputy medical examiner both testified there was consensus in their office that the cause and manner of Williams's death were "undetermined." However, in answering a hypothetical question posed by the prosecutor, the chief medical examiner opined that if it were established that Huynh had given Williams benzodiazepines and sexually assaulted him, he would agree that the manner of death should be changed to homicide and the cause of death should be changed to sudden death during sexual assault.

The defense also presented testimony from the chief medical examiner for Utah, who disagreed with the prosecution expert about the significance of the postmortem condition of Williams's lungs. The expert opined that the blockage in Williams's

coronary artery was unusual for someone his age and possibly contributed to his death. Thus, the expert agreed with the initial assessment that Williams's manner and cause of death were properly classified as "undetermined."

Jury Verdicts and Sentencing

The jury found Huynh guilty of first degree murder (§ 187), and found true the special circumstance allegations that he committed the murder during the commission of sodomy and oral copulation (§ 190.2, subd. (a)(17)(D), (F).) The jury also found Huynh guilty of two counts of sodomy of an intoxicated person (§ 286, subd. (i)) and two counts of oral copulation of an intoxicated person (former § 288a, subd. (i) [now § 287, subd. (i)]), one count of each offense as to both Williams and Jeremiah.

The trial court sentenced Huynh to life without the possibility of parole, plus 10 years.

Huynh's Prior Appeal

Huynh appealed his convictions, asserting 12 claims of error. As relevant here, he claimed (1) there was insufficient evidence that Williams died by criminal agency (as opposed to from a preexisting medical condition); (2) the jury instructions on first degree felony-murder did not properly address causation; and (3) the court erred by refusing to instruct the jury on second degree murder as a lesser included offense. We rejected these claims and affirmed.

As to the sufficiency of the showing of criminal agency, we observed "it is up to the jury—not an appellate court—to determine what weight to give to the" extensive and conflicting expert witness testimony. (*Huynh*, *supra*, 212 Cal.App.4th at p. 301.) We

further observed that Huynh's arguments ignored the defense experts' concessions on cross-examination. (*Id.* at p. 302.)

Regarding the jury instructions on causation, we explained that traditional causation principles did not apply to this single-perpetrator felony-murder case:

> "[O]ur Supreme Court has made it clear that in a case such as this one, which involves a single perpetrator, application of the felony-murder rule lies outside the context of causation principles, such as proximate causation, natural and probable consequences and foreseeability. In other words, the felony-murder rule imposes a type of strict liability on the perpetrator acting on his or her own. '[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.' [Citation.] 'Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances.' [Citation.] Accordingly, the felony-murder rule generally does not require proof of a strict causal relationship between the underlying felony and the killing if there is one actor, and the felony and the killing are part of one continuous transaction." (*Huynh, supra*, 212 Cal.App.4th at pp. 309-310.)

In light of these principles, we concluded the trial court had properly instructed the jury regarding causation. (*Huynh, supra*, 212 Cal.App.4th at pp. 310-311.)

Finally, we rejected Huynh's contention that the trial court should also have instructed the jury on second degree murder. In doing so, we explained that the implied-malice theory of second degree murder, which arises when a defendant engages in inherently dangerous conduct, was inapplicable to Huynh because "sodomy *of an*

intoxicated person and/or oral copulation *of an intoxicated person* are not inherently dangerous to life and/or do not pose a significant prospect of violence." (*Huynh*, *supra*, 212 Cal.App.4th at pp. 314-315.)

The California Supreme Court denied Huynh's petition for review.

Huynh's Petition for Resentencing Under Senate Bill No. 1437

Effective January 1, 2019, the Legislature enacted Senate Bill No. 1437, which amended section 189 to limit the applicability of the felony-murder rule to a person who: (1) "was the actual killer"; (2) though not the actual killer, assisted the commission of first degree murder "with intent to kill"; or (3) was "a major participant in the underlying felony and acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 3.) The bill also added section 1170.95, which allows a person convicted under the former felony-murder standard to seek resentencing if he or she could not have been convicted under the new standard. (Stats. 2018, ch. 1015, § 4.)

About three weeks after Senate Bill No. 1437 took effect, Huynh filed a petition for resentencing and requested that the court appoint him counsel. He argued he was eligible for resentencing under the new felony-murder standard because "the evidence . . . shows that [he] did not engage in any killing, did not have any intent to kill, and did not act with reckless indifference to life . . . ." Specifically, Huynh argued "that the state's theory of asphyxia is untrue, wholly speculative and unsupported by sound scientific evidence, that their proffer of proof does not rise beyond reasonable doubt as to any killing, which is the essential element of proof of murder; and . . . that the evidence on

record and newly presented evidence [in his petition] point to internal cause of natural death due to heart disease and not any external factor or killing . . . ."

Huynh supported his petition with a 10-page declaration in which he extensively reargued the conflicting medical evidence introduced at trial regarding Williams's cause of death. He supported his argument with citations to various case law and medical publications. He did not, however, cite any truly new evidence or authority pertaining directly to the facts of his case.[5]

The trial court summarily denied Huynh's motion without first appointing him counsel or holding an evidentiary hearing. Citing our prior opinion, the trial found Huynh "was the actual killer" (§ 189, subd. (e)(1)) and, thus, was ineligible for resentencing even under the new felony-murder standard:

> "In this case, the underlying felonies resulting in the death of the victim were committed by a sole perpetrator—[Huynh]. Thus, [Huynh] was 'the actual killer.' [Huynh]'s argument that the victim died a natural death as a result of preexisting medical conditions, and not by any 'killing' by [Huynh], are unavailing. [Huynh] is attempting to relitigate here what has already been litigated at trial and on appeal regarding whether the victim's death was an accident. The evidence supports a finding that it was not an accident. [Citation.] [¶] Accordingly, the petition is denied. Because the petition is denied, the request for appointment of counsel is also denied."

Huynh appeals.

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5 By a separate order concurrently filed in case number D076699, we have denied Huynh's petition for habeas corpus, which he based largely on the assertions in his resentencing petition.

DISCUSSION

Huynh contends the trial court erred by summarily denying his resentencing petition at the prima facie review stage without first holding a hearing or appointing him counsel. As he reads section 1170.95, subdivision (c), the trial court was confined at this stage to conducting "a purely 'facial' review" of "the factual assertions in the petition," which the trial court was required to accept as true. Thus, he contends that because he alleged facts facially establishing his eligibility, the trial court erred by looking behind those facts—to our prior opinion—to determine Huynh was, in fact, ineligible. We disagree.

I. *Senate Bill No. 1437*

To protect the "bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability" (Stats. 2018, ch. 1015, § 1, subd. (d)), the Legislature enacted Senate Bill No. 1437 to narrow the scope of liability under the felony-murder rule,[6] and to provide a mechanism by which individuals convicted under the old standard could petition for resentencing if they could not be convicted under the new, narrower standard.

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6 Senate Bill No. 1437 also narrowed the scope of liability under the natural and probable consequences doctrine, which "rendered a defendant liable for murder if he or she *aided and abetted* the commission of a criminal act (a target offense), and a principal in the target offense committed murder (a nontarget offense) that, even if unintended, was a natural and probable consequence of the target offense." (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 248 (*Lamoureux*), italics added.) However, we need not discuss this doctrine because, as Huynh acknowledges in his appellate briefing, he "was prosecuted exclusively on the felony murder theory." (See *Huynh*, *supra*, 212 Cal.App.4th at p. 312 ["the prosecution's case was tried strictly on a first degree felony-murder theory"].)

A. *Narrowing of the Felony-Murder Rule*

"Under the felony-murder rule as it existed prior to Senate Bill [No.] 1437, a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony . . . without further examination of his or her mental state." (*Lamoureux*, *supra*, 42 Cal.App.5th at pp. 247-248; see § 189, subd. (a) [specifying felonies, including sodomy (§ 286) and oral copulation (former § 288a [now § 287])].) " 'The purpose of the felony-murder rule [was] to deter those who commit[ted] the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.' " (*Lamoureux*, at p. 248.)

Senate Bill No. 1437 narrowed the scope of the felony-murder rule by adding subdivision (e) to section 189, which provides that a participant in a specified felony is now liable for murder for a death during the commission of the offense *only* if one of the following is proven:

> "(1) The person was the actual killer.
>
> "(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> "(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." (Stats. 2018, ch. 1015, § 3.)[7]

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[7] In addition, section 189, subdivision (e) "does not apply to a defendant when the victim is a peace officer who was killed while in the course of the peace officer's duties,

Senate Bill No. 1437 did not narrow the list of qualifying felony predicates. (Stats. 2018, ch. 1015, § 3.)

B. *Resentencing Petitions*

Senate Bill No. 1437 also established a resentencing mechanism by adding section 1170.95 to the Penal Code. (Stats. 2018, ch. 1015, § 4.)

Subdivision (a) of section 1170.95 specifies the resentencing eligibility criteria, which generally require that (1) the charging document must have asserted a felony-murder theory; (2) the petitioner must have been convicted of first or second degree murder; and (3) "[t]he petitioner could not be convicted of first or second degree murder because of changes to [s]ection . . . 189 made effective January 1, 2019" by Senate Bill No. 1437.

Subdivision (b) of section 1170.95 specifies the information the petition must contain, which includes (1) a declaration by the petitioner that he or she meets the eligibility criteria set forth in subdivision (a); (2) the superior court case number and year of conviction; and (3) "[w]hether the petitioner requests the appointment of counsel."

Subdivision (c) of section 1170.95 specifies the prima facie review process the trial court must employ. We quote it here in full because it is central to the issues in this appeal:

> "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the

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where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (§ 189, subd. (f).)

> court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

Subdivision (d) of section 1170.95 specifies the manner in which the trial court shall conduct the order-to-show-cause hearing (unless the parties waive a hearing and stipulate that the petitioner is entitled to be resentenced). (§ 1170.95, subd. (d)(1)-(2).) If the parties do not waive the hearing, the prosecution bears the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The parties "may rely on the record of conviction *or offer new or additional evidence*." (*Ibid*., italics added)

Finally, if the petitioner is found eligible for relief, the murder conviction must be vacated and the petitioner resentenced "on any remaining counts in the same manner as if the petitioner had not been [*sic*] previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1); see *Lamoureux*, *supra*, 42 Cal.App.5th at p. 249.)

II. *Trial Courts May Consider the Record of Conviction During the Prima Facie Review*

Huynh maintains the trial court was confined at the prima facie review stage to conducting a purely facial review of the factual assertions in the petition, which the court was required to accept as true. Thus, he contends the court erred by looking behind those allegations—namely, to our prior opinion—to determine Huynh was, in fact, ineligible. We disagree.

The court in *Lewis*, *supra*, 43 Cal.App.5th 1128, rev.gr., was the first to consider and reject a substantially similar argument. (*Id.* at p. 1137 ["Defendant contends the court could look no further than his petition"].) In doing so, the court observed there are several "analogous situations [in which] trial courts are permitted to consider their own files and the record of conviction in evaluating a petitioner's prima facie showing of eligibility for relief." (*Ibid.*) These include petitions to reclassify a conviction under the Safe Neighborhoods and Schools Act (Proposition 47), petitions for resentencing under the Three Strikes Reform Act of 2012 (Proposition 36), and petitions for writs of habeas corpus. (*Lewis*, at pp. 1137-1138.) Huynh acknowledges that Proposition 47 and habeas proceedings are analogous.

The *Lewis* court explained why applying this approach to section 1170.95, subdivision (c) would be "sound policy":

> " 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' " (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138, rev.gr., quoting Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 23:51(H)(1), pp. 23-150 to 23-151.)

Applying these principles, the *Lewis* court concluded the trial court "could, and properly did, consider the record of defendant's conviction"—including the appellate

court's prior opinion in the petitioner's direct appeal—when conducting its prima facie eligibility review. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137, rev.gr.)

After *Lewis*, the courts in *Verdugo*, *supra*, 44 Cal.App.5th 320, rev.gr., and *Torres*, *supra*, 46 Cal.App.5th 1168, similarly concluded that trial courts may look beyond the face of the petition to determine whether the petitioner has stated a prima facie case for eligibility. (*Verdugo*, at p. 329 ["documents in the court file or otherwise part of the record of conviction that are readily ascertainable . . . should . . . be available to the court in connection with the first prima facie determination required by subdivision (c)"]; *id.* at p. 333 ["A court of appeal opinion, whether or not published, is part of the appellant's record of conviction. [Citations.] Accordingly, it was proper for the superior court to consider [the appellate] court's [prior] opinion . . . ."]; *Torres*, at p. 1178 ["the trial court is permitted to review information that is readily ascertained"].)

We find these courts' reasoning persuasive and likewise hold that trial courts may look beyond the face of a petition when determining whether a petitioner has stated a prima facie case of eligibility for resentencing under section 1170.95.

III. *Trial Courts Need Not Appoint Counsel Until After the Prima Facie Review*

Huynh also reads section 1170.95, subdivision (c) as entitling him to appointed counsel before the court makes its prima facie determination. Again, every court that has considered the issue has rejected Huynh's proffered reading.

The *Lewis* court reasoned that because section 1170.95, as a whole, is laid out chronologically (see part I, *ante*), so too should subdivision (c) be read chronologically. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1140, rev.gr.) Reading the subdivision in such a

manner, the *Lewis* court concluded the right to counsel does not arise until after the court has made its prima facie eligibility determination:

> "Given the overall structure of the statute, we construe the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95 subdivision (c); that is, after the court determines that the petitioner has made a prima facie showing that petitioner 'falls within the provisions' of the statute, and before the submission of written briefs and the court's determination whether petitioner has made 'a prima facie showing that he or she is entitled to relief.' " (*Lewis*, *supra*, 43 Cal.App.5th at p. 1140, rev.gr.)

The *Verdugo* court reached the same conclusion on similar reasoning. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 332, rev.gr. ["The structure and grammar of this subdivision indicate the Legislature intended to create a chronological sequence: first, a prima facie showing; thereafter, appointment of counsel for petitioner; then, briefing by the parties."]; see *Torres*, *supra*, 46 Cal.App.5th at p. 1173 ["We disagree with [the appellant]'s broad assertion that a trial court may not summarily deny a petition on the basis of the record of conviction prior to appointment of counsel and briefing . . . ."]; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [succinctly holding that a petitioner is not entitled to appointed counsel if the petitioner "is indisputably ineligible for relief"], review granted, March 18, 2020, No. S260410.)

We agree with these courts' reasoning and likewise hold that section 1170.95, subdivision (c) does not require the trial court to appoint counsel for the petitioner until after the court has made a prima facie finding of eligibility for resentencing.

Because we conclude the trial court properly determined Huynh had not stated a prima facie case of eligibility for resentencing (see part IV, *post*), the denial of counsel at

this stage did not, as Huynh suggests, violate his constitutional rights to the assistance of counsel or due process. To the contrary, even the authorities on which Huynh relies most heavily recognize the right to counsel in analogous contexts does not arise until after the petitioner has made a prima facie showing. (See *People v. Rouse* (2016) 245 Cal.App.4th 292, 299 ["Our analysis does not conflict with [cases that] . . . concern only the initial *eligibility stage* of a petition under [Proposition 47], *not* the resentencing stage . . . . [¶] This case presents a separate issue. Defendant passed the eligibility stage."]; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 983 ["In light of the fact writs of habeas corpus and writs of *coram nobis* . . . require court-appointed counsel for an indigent petitioner or moving party *who has established a prima facie case for entitlement to relief*, . . . interpreting section 1473.7 [regarding withdrawal of a guilty plea based on adverse immigration consequences] to also provide for court-appointed counsel *where an indigent moving party has adequately set forth factual allegations stating a prima facie case* for entitlement to relief would best effectuate the legislative intent in enacting section 1473.7."], italics added, fn. omitted.)

Similarly, Huynh acknowledges in his briefing that a due process-based right to counsel arises "on appeal or in a collateral writ proceeding *after an order to show cause has been issued*"; that is, after the petitioner has made a prima facie showing.

Finally, because the trial court complied with the procedures set forth in section 1170.95, subdivision (c), the court did not, as Huynh contends, deprive him of procedural due process.

IV. *The Trial Court Properly Determined Huynh Was Ineligible*

Having determined the trial court complied with section 1170.95's procedure for preliminarily determining Huynh's eligibility for resentencing, we must now determine whether the trial court properly found the record conclusively established Huynh was ineligible. We conclude that it did.

To make a prima facie showing of eligibility for resentencing under Senate Bill No. 1437, Huynh had to establish (among other things) that he "could not be convicted of first or second degree murder because of changes to [s]ection . . . 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).) The changes to section 189 do not aid Huynh because they still allow conviction on a felony-murder theory if the petitioner committed a specified felony and "was the actual killer." (§ 189, subd. (e)(1).) The record conclusively establishes these prerequisites are met.

First, the jury found Huynh guilty of committing a murder during the commission of sodomy and oral copulation. Even after Senate Bill No. 1437, section 189 still specifies sodomy and oral copulation as qualifying predicates for the felony-murder rule. (§ 189, subd. (a); see Stats. 2018, ch. 1015, § 3.)

Second, the record conclusively establishes Huynh "was the actual killer." (§ 189, subd. (e)(1).) In our prior opinion, we referred to this murder case as a "single-perpetrator" case at least five times. (See *Huynh*, *supra*, 212 Cal.App.4th at p. 309 ["In this single-perpetrator felony-murder case"]; *ibid*. ["in a case such as this one, which involves a single perpetrator"]; *id.* at p. 310 [explaining that certain jury instructions were inapplicable because they "are intended for felony-murder cases that do not involve a

single perpetrator"]; *id.* at p. 311 ["Huynh is attempting to graft onto this single-perpetrator felony-murder case . . . ."]; *ibid.* [Huynh's reference to bench notes for a pattern jury instruction "is misleading as the instruction does not apply where death results during the felony conduct undertaken by a single perpetrator."].) There is no dispute that Huynh was that single perpetrator.

In attempting to escape this conclusion, Huynh does not argue that *someone else* "was the actual killer." (§ 189, subd. (e)(1)). Instead, he suggests that, in light of Senate Bill No. 1437's intent to impose punishment commensurate with the perpetrator's degree of culpability, there was *no killer* because Huynh did not engage in the type of reprehensible conduct required to give rise to murder liability. We disagree.

It is plain from the overall context of Senate Bill No. 1437, including its title—"Accomplice liability for felony murder" (2018 Stats., ch. 1015)—the Legislature sought to ensure proportionate punishment for *accomplices*. Thus, for participants in a specified offense who are not "the actual killer," new section 189, subdivision (e) requires that they harbor a more culpable mental state than was previously required. (§ 189, subd. (e)(2) [an accomplice assisting the commission of first degree murder must act "with intent to kill"]; *id.* subd. (e)(3) [an accomplice must be a "major participant in the underlying felony and act[] with reckless indifference to human life"].) By contrast, for the participant who "was the actual killer," subdivision (e) imposes no such heightened degree of culpability—it requires only that "[t]he person was the actual killer." (§ 189, subd. (e)(1).)

We disagree with Huynh that the term "the actual killer" is "vague and ambiguous" in the context of an "unintended, accidental death during [the] commission . . . of a qualifying felony," which he contends occurred here. In the context of the felony-murder rule, "the actual killer" is the person whose conduct during the commission of a qualifying felony predicate caused the victim's death. That is, the term distinguishes who *among multiple accomplices* "was the *actual* killer." (§ 189, subd. (e)(1), italics added.)[8] Nothing indicates the Legislature intended that the term impose a new heightened causation or culpability standard for determining whether a perpetrator was *a killer*, at all.[9]

In this vein, we find it significant that the Legislature, in amending section 189 to add new subdivision (e), did not narrow the list of qualifying felony predicates. Thus, the list still includes sodomy and oral copulation, which, as we observed in the context of the facts of Huynh's original appeal, "are not inherently dangerous to life and/or do not pose a significant prospect of violence." (*Huynh*, *supra*, 212 Cal.App.4th at pp. 314-315.) Theoretically, this observation would have provided relief to *an accomplice who was not*

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8 Thus, for example, the bank robber who shot and killed the teller "was the actual killer," whereas the getaway driver who waited in the car was not.

9 Because of this distinction, the purported "new evidence" Huynh included with his resentencing petition is irrelevant because it did not purport to identify *someone else* as the actual killer; it purported to establish that Huynh's criminal agency did not cause Williams's death, a proposition we rejected in our prior opinion. (See *Huynh*, *supra*, 212 Cal.App.4th at pp. 298-305.) The evidence might be relevant in a habeas proceeding if it were truly *new*, but, as we explained in footnote 5 and its accompanying text, the evidence was not, in fact, new.

the actual killer by negating the newly required culpability level of either assisting the commission of first degree murder "with intent to kill" (§ 189, subd. (e)(2)) or of being a "major participant in the underlying felony and act[ing] with reckless indifference to human life" (§ 189, subd. (e)(3)). However, it is of no moment here, because Huynh—as the sole perpetrator—"was the actual killer." (§ 189, subd. (e)(1).)

Because the record conclusively establishes that Huynh "was the actual killer" of Williams during the commission of a qualifying felony, Huynh could still be convicted of murder under the felony-murder rule as modified by Senate Bill No. 1437. Accordingly, the trial court properly found him ineligible at the prima facie review stage.

DISPOSITION

The order is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.